No. 10,303

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

WASHINGTON BREWERS INSTITUTE, *et al.*,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

REPLY BRIEF OF APPELLANTS

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LIQUOR ENFORCEMENT ACT OF 1936

Before replying to the Government's principal arguments, we desire to eliminate those matters upon which there is no dispute. At page 10, *et seq.*, of the

Government's brief, a number of cases are cited which involve the Liquor Enforcement Act of 1936.[1] This Act is by its very terms an Act to enforce the Twenty-First Amendment. We have no where contended that the Federal Government lacks authority to enforce that amendment. At page 25 of our opening brief we conceded that the Federal Government had the *duty* to enforce the Twenty-First Amendment.

Thus also the decision in the *Arrow Distilleries Case*[2] (cited at pages 9, 23, 34 Gov't. Br.) is based upon the principle that the Federal Government has power to enforce the Twenty-First Amendment.

THE WM. JAMESON CASE

With the case of *Wm. Jameson Inc. v. Morgenthau*[3] (cited at pages 10, 23, 25 Gov't. Br.) we have no quarrel. It is obviously correct but of no application to the instant case. That case deals with the power of the Federal Government over foreign commerce. While the power to regulate foreign and interstate commerce is conferred by the same clause of the constitution the two powers are separate and distinct by name and nature. The Twenty-First Amendment does not deal with the former but solely with the latter. The delegation by the Constitution of power to regulate foreign commerce is complete and absolute of necessity while delegation of power over commerce among the states is relative.

Control of foreign commerce is an essential *national*

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[1] 49 Stat. 1928, 27 U.S.C.A. 221, *et seq.*

[2] 109 F.(2d) 397.

[3] 307 U.S. 171.

characteristic. Control over internal commerce under the Federal system is not. It is difficult to conceive how a nation could be called such under our system without complete power over foreign commerce without limitation of any kind. Control over internal commerce was limited to that among the several states and with the Indian tribes and then for the purpose only of securing and insuring the freedom of such commerce. Thus, the Supreme Court said:[4]

> "And, again in the constitution, the power to regulate commerce is conferred by the same words of the commerce clause with respect both to foreign commerce and interstate commerce. Yet the power when exercised in respect of foreign commerce may be broader than when exercised as to interstate commerce. In the regulation of foreign commerce an embargo is admissible; but it reasonably cannot be thought that, in respect of legitimate and unobjectionable articles, an embargo would be admissible as a regulation of interstate commerce, since the primary purpose of the clause in respect of the latter was to secure freedom of commercial intercourse among the states."

Under our system of government there can be no importation into a state from a foreign nation. There can only be an importation into the United States. Foreign commerce is between citizens of the United States (not citizens of a state) and citizens of a foreign nation.[5] Hence, the language of the Twenty-

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[4] *Atlantic Cleaners & Dyers v. U. S.* 286 U.S. 427.

[5] *United States v. Steffen*, 100 U.S. 82, at 96; *Henderson v. New York*, 92 U.S. 259 at 270; *United States v. Halliday*, 3 Wall (U.S.) 407 at 417.

First Amendment, "transportation or importation into any state" can and must refer only to commerce among the states and not to foreign commerce.

REFERENCES TO LEGISLATIVE DEBATE

Government counsel answer our references to the Senate debate on the Twenty-First Amendment by stating that the language is clear and unambiguous and, therefore, resort may not be had to legislative expressions (Gov't. Br. p. 16). Thereupon counsel resorts to a brief—an all too brief—analysis of the same debate to demonstrate that our conclusion is wrong.

It must be admitted that language of the Twenty-First Amendment is simple, clear and in itself unambiguous. Applied to certain facts its application seems clear.[6] However, under other circumstances its legal effect may not be clear without resort to sources other than the amendment itself. This, we believe, will become abundantly clear when we discuss the Government's first and principal contention.

We shall not repeat our references to and quotations from the senate debate to demonstrate the erroneous conclusions drawn therefrom by counsel. However, we do feel constrained to call the court's attention to the reference to and quotation from congressional debate which appears in the *Flippin Case*[7] cited by the Government in which the Circuit Court of Appeals for the Eighth Circuit quotes with approval

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[6] *State Board, etc., v. Young's Market*, 299 U.S. 59.

[7] *Flippin v. U.S.*, 121 F. (2d) 742.

the following excerpt from the report of the House Committee on Ways and Means on the Cullen Act as follows:

> "The liquor traffic will be controlled by the Federal Government only to the extent that the states may desire; and that is in keeping with the *obvious intent* of the Twenty-First Amendment." (italics quoted)

This report was made at a time when the Twenty-First Amendment was before the people.

REPLY TO APPELLEE'S PRINCIPAL CONTENTION

We come now to the Government's principal contention. It is stated as follows (Gov't. Br. p. 8):

> "The Twenty-First Amendment does not deprive the United States of the power to regulate interstate commerce when such commerce *is carried on without violation of state laws.*"

This contention means that with respect to commerce among the states in intoxicating liquor:

(1) Federal Jurisdiction *extends* to commerce which
   (a) *Complies* with positive state legislation
   (b) Is not contrary to state law or where no state law has been enacted

(2) Federal Jurisdiction *does not extend* to commerce which
   (a) *Violates* positive state law.

This contention is wrong on every count. Immediately after stating this contention counsel cite numerous cases based on the Liquor Enforcement Act of 1936 which provides punishment for the *violation* of state laws, a power (and the only power) obviously

delegated to the Federal Government by the Twenty-First Amendment. Thus, its own citations brand as erroneous the contention that Federal jurisdiction fails when the commerce involved violates state law.

The Supreme Court cases cited by us and noticed by the Government (Gov't. Br. pp. 14-15) demonstrates the error of the first proposition that Federal jurisdiction extends to commerce which *complies* with state legislation. These cases are thoroughly analyzed in our opening brief and we will not repeat that analysis (App. Br. pp. 18 to 24). Appellants have insisted at all times that it was this attitude on the part of the Federal authorities, which led to the present indictment.

The Twenty-First Amendment *prohibits* transportation and importation into any state in violation of the laws thereof. Therefore, the Twenty-First Amendment *permits* only transportation and importation into any state which *complies with* or *does not violate* state law. It leaves no room for the application of any federal law to apply to this commerce (except that which enforces the Twenty-First Amendment). The state laws and those laws alone and exclusively govern the legality and illegality of this commerce.

In opposition to the Government's contention we have at all times contended that with respect to this commerce

(1) Federal jurisdiction *does not extend* to commerce which
   (a) *Complies* with state law;
   (b) Is not contrary to state law.

(2) Federal jurisdiction *does extend* to commerce which

(a) *Violates* state law.

There is no argument or authority in the Government's brief which answers or even attempts to answer this contention.

If under the allegations of the indictment before the court the Government proved that the appellants combined and agreed to

1. Secure adherence, as required by state law, to prices posted as required by state law;
2. Secure observance of state law requiring prices to be posted according to established zones;
3. Secure posting and adherence to prices on a delivered basis only as required by state law, thus eliminating freight differentials;
4. Secure adherence to state law limiting, curtailing or forbidding the extension of credit;
5. Secure adherence to the prohibition of state law concerning quantity discounts,

a conviction would be warranted if the Sherman Act was applicable, and such proof would sustain the allegation of the indictment. These identical practices were declared by the Supreme Court to constitute a combination in restraint of trade in *Sugar Institute v. United States.*[8]

Yet on this proof appellants would be convicted for combining and agreeing to observe laws which they are bound to observe at their peril. They would be convicted of criminal conspiracy when neither the purpose nor the means of the combination were illegal.

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[8] 297 U.S. 535.

STATE LAWS AND PRICE FIXING

Appellee argues that the state laws and regulations do not require, permit, authorize or condone price fixing. This we vigorously deny. The state laws do *require* price fixing. The laws and regulations which we have set forth in our opening brief effectively accomplish price fixing and are obviously so intended. They provide how, when and according to what conditions appellants shall establish prices. They require appellants to announce publicly what their prices will be at least ten days before such prices become effective. Once announced the prices must remain in effect without deviation until another public notice at least ten days in advance is given. Each of appellants must file prices in the same manner and according to the same formula. Compliance in any manner with these state laws must bring about a fixing of prices. Such a result is inevitable. Short of naming price by law this method is perhaps the most effective means which could be adopted.

The court will recall that this method was adopted as the price fixing method under the National Recovery Act. It was recognized as being contrary to the Sherman Act and the N.R.A. provided for the suspension of the Sherman Act.

Appellee points to the allegations of the indictment concerning discussions and agreements concerning prices to be posted. Assuming those allegations to be true, there is nothing in the state laws prohibiting such discussions or agreements. Nor are they inconsistent with the provisions of those laws. The requirement that competitors be notified at least ten days

before any price change is made is in itself an enforced discussion. Any analysis of the practical working of these laws must convince any reasonable mind that they compel the very result which in most other instances is sought to be accomplished by so-called price-fixing agreements.

It must be remembered also that the state at all times has control of the situation. Under the law they have the industry under close surveillance. The prices are filed with them. They enforce adherence to those prices. If appellants file prices concertedly the state knows that fact. It would be impossible for appellants to do any of the things charged in the indictment without the full knowledge of the state. All books and records are open to and are frequently inspected. Every act and transaction is scrutinized by state enforcement officers.

If the state felt that any of its regulations were being violated, or if the appellants were engaging in practices concerning prices which the state considered inimical to public welfare it has authority to punish violations and if necessary to name the prices at which appellants' products shall be sold. That they have not seen fit to do this is conclusive of their opinion that nothing wrong has been done. Appellee alleges that this conspiracy began in 1935 and continued to the date of the indictment. These regulations have been effective during that time. This indictment was returned almost two years ago. None of the regulations or laws have been changed.

Apparently the states are quite satisfied with the

conduct of appellants in spite of what one section of the Department of Justice has thought of it.

CONCLUSION

Appellee has failed completely to answer appellants' contentions. The decision and judgment of the lower court should be reversed.

Respectfully submitted,

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